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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-611

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

and

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

BRIEF FOR RESPONDENT MARTIN E. SEGAL IN OPPOSITION

WHITNEY NORTH SEYMOUR
Counsel for Respondent to the Cross-Petition
MARTIN E. SEGAL
One Battery Park Plaza
New York, New York 10004

Of Counsel

ROY L. REARDON
MELVYN L. CANTOR
RONALD L. GINNS
SIMPSON THACHER & BARTLETT

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BRIEF FOR RESPONDENT MARTIN E. SEGAL IN OPPOSITION

Preliminary Statement

Martin E. Segal submits this brief in opposition to the cross-petition filed by plaintiffs James M. Morrissey, Joseph Padilla and Ralph Ibrahim for review of a decision by the United States Court of Appeals for the Second Circuit.* Although myriad issues are presented in the cross-petition, and in the petition filed by defendant Abraham

* Since two petitions for certiorari presently are on file, the parties will be referred to as "plaintiffs" and "defendants", respectively.

E. Freedman ("Freedman"), this brief addresses itself to only the two of those issues which affect Martin E. Segal: (a) the question of what sum should be returned by the National Maritime Union Officers' Pension Plan ("Pension Plan") to the National Maritime Union ("NMU") and (b) the question of surcharge on account of payments made out of the Pension Plan to Irving Brauch in April 1966. We submit that neither of these two questions presents an issue appropriate for review by this Court since each involves the application of established legal principles to narrow factual findings made by the United States District Court for the Southern District of New York, which findings of fact and application of legal principles were affirmed in all respects by the United States Court of Appeals for the Second Circuit.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

As noted above, although numerous questions are presented in the petition and cross-petition, Mr. Segal is a respondent with respect to only two of them, which he would restate as follows:

1. Is the construction to be given to certain written instruments in calculating the amount of funds to be returned by the Pension Plan to the NMU an appropriate subject for review by this Court, particularly where the proper construction was unanimously agreed upon by the courts below?

2. Is the factual question of the good faith of a trustee an appropriate subject for review by this Court where the courts below unanimously agreed that the trustee had acted in good faith and where the plaintiffs did not even proffer evidence to the contrary?

PROCEEDINGS BELOW

Due to the extended nature of the proceedings below, a brief description of the history of this litigation might be helpful to the Court.

This action was commenced in February, 1969, pursuant to the provisions of Section 501 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501 (the "LMRDA"). Soon thereafter, some of the defendants (not including Mr. Segal,* who had not yet been served with process) moved for summary judgment, and the plaintiffs cross-moved for summary judgment. Defendants' motions were denied. Plaintiffs' cross-motions were granted to the extent that the Pension Plan was held to have improperly included as participants certain "non-officer employees" of the NMU. 302 F. Supp. 32 (S.D.N.Y. 1969) [SA 25]**

In February, 1970, the Court of Appeals affirmed the District Court's determination that the NMU constitution, as amended in 1960, did not permit the participation of "non-officers" in the Pension Plan, and remanded the matter to the District Court for further proceedings. 423 F.2d 393 (2d Cir. 1970) [SA 1]. Two separate petitions for certiorari were denied by this Court at 399 U.S. 928 (1970) and 400 U.S. 826 (1970).

After remand, substantial discovery was had and on August 23, 1971, a trial was held solely to determine the amount to be returned to the NMU treasury in accordance with the mandate of the Court of Appeals. On January

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* Mr. Segal is currently an outside trustee of the Pension Plan and has served in that capacity since the Plan's inception. Mr. Segal is Chairman of the Board of Directors of the Martin E. Segal Company, actuaries and pension advisers to the Plan, and has no connection with the union management. [419a-420a; A37]

** References herein by page number are in the form set forth in the petition and cross-petition.

11, 1972, the District Court rendered its opinion setting that amount at $520,283.38. 336 F.Supp. 1107 (S.D.N.Y. 1972) [SA 84].* In that decision, the District Court also determined that the trustees of the Pension Plan had paid out to non-officers the amount of $371,271.** The question of the personal liability, if any, of the defendants in connection with these payments to non-officers was set down for trial.

Plaintiffs presented their evidence on the issue of personal liability on April 13, 14 and May 1, 1972, and, at the close of that evidence defendants moved to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. On June 29, 1972 the District Court granted the motions to dismiss as to all payments except those to William Perry ("Perry") [A1].† On July 12, 1972, certain of the defendants, including Mr. Segal, presented evidence of their good faith with regard to the Perry payment, and the matter was taken under submission by the District Court.††

On October 26, 1972, the District Court rendered its opinion surcharging the defendant Freedman, as a trustee of the Pension Plan, for the payment made to Perry, and dismissing the complaint as to all other defendants. 351 F. Supp. 775 (S.D.N.Y. 1972) [A17]. Plaintiffs appealed from this decision and the District Court's decision of January 11, 1972 with respect to the amount of money to

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* With interest, the judgment amounted to $674,222.60 and this judgment has been paid [A3].

** One such non-officer was William Perry and a separate judgment was entered as to him which, with interest, totals $263,307 [A3]. The trustees have initiated supplementary proceedings to collect this judgment but, as yet, to no avail.

† Virtually no evidence was presented to the District Court with regard to any payments except those to Perry, and that Court's dismissal with regard to the other payments was clearly mandated by this total lack of evidence. Except with respect to Mr. Brauch, we do not understand plaintiffs to contend otherwise.

†† Mr. Segal also had presented evidence out of order on April 14, 1972. This evidence was not considered in connection with defendants' motion to dismiss [418a-501a, 685a].

be returned by the Pension Plan to the NMU.* On June 18, 1973, the Court of Appeals rendered its opinion affirming the District Court decision in all respects. [A35].

Plaintiffs then filed a petition for rehearing with a suggestion that the matter be reheard *en banc*. This petition was denied without dissent on July 17, 1973 [SA 45].**

COUNTERSTATEMENT OF FACTS

In the interest of clarity, it is necessary to submit this counterstatement of the facts relevant to the propriety of review of the two issues as to which Mr. Segal is a respondent.

A. Non-Officers v. Non-Elected Personnel

The trust agreement which underlies the Pension Plan was entered into initially in December, 1952, by and between the NMU as settlor and Herman E. Cooper (an attorney), Leon Karchmer and Mr. Segal as trustees [937a-948a].

Throughout this lengthy litigation, it has been conceded that, under the NMU constitution in effect in 1952, the NMU as settlor could have provided in the 1952 trust agreement that not only NMU officers but also any and all other employees of the NMU be included as participants of the Pension Plan.† The NMU, however, apparently did not then desire to include such other employees of the Union in the Pension Plan.

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* Appeals also were taken by certain of the other parties from one or both of these decisions.

** On August 6, 1973, the Court of Appeals granted a rehearing to the defendant Perry solely to amend its June 18, 1973 opinion to make clear that it affirmed the District Court's finding of jurisdiction over Mr. Perry and entry of judgment against him [SA 46].

† The NMU constitution in effect in 1952 is analyzed in the District Court's May 23, 1969 opinion [SA 25].

In 1960, the NMU constitution was amended to provide as follows:

> "*Pensions: All Officers* shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of the Plan may establish." (Emphasis added.) [SA 27].

The District Court and the Court of Appeals have agreed that the effect of this amendment was to remove from the National Council of the NMU the power previously vested in it to include "non-officers" in the Pension Plan.

In October, 1961, the Trust Agreement was amended ("1961 Amendment") to broaden the coverage of the Pension Plan to include the following categories of persons: "Union Representatives", defined as persons employed in the position of "Assistant to the President" and "Organizer"; and, "Supervisory or Professional" employees of the NMU occupying the positions of "Maintenance Supervisor", "Bookkeeping Supervisor," "Records and Supply Supervisor," "Executive Secretary," "Publicity Director and Editor of 'The Pilot'." 1961 Amendment, §§ I.7, I.8 and I.9; [SA 27]. The 1961 Amendment was signed by the appropriate officers of the NMU and by each of the Trustees. [949a, 964a].

In September, 1964, the Trust Agreement was once again amended ("1964 Amendment") to broaden the coverage of the Pension Plan [965a-967a]. Under this Amendment, the Pension Plan was to include:

> "All other employees of the Union except (a) any employee whose compensation, hours of work or conditions of employment are determined by or with reference to a collective bargaining agreement, (b) any employee whose customary employment by the Union is for not more than twenty (20) hours in

> any one week or for not more than five (5) months in any one calendar year, and (c) aliens employed in a foreign country."*

It is apparent, and was obvious to the courts below, that, far from being discriminatory, the 1961 and 1964 amendments to the Trust Agreement effectively brought under the coverage of the Pension Plan every full time employee of the Union who was not otherwise covered by a collective bargaining agreement. Each of the amendments to the Trust Agreement, and each corresponding amendment to the Pension Plan, was approved by the membership of the NMU [251a-252a]. Moreover, the 1964 Amendment evidently was occasioned, at least in part, by requirements of the Internal Revenue Service regarding tax exempt pension plans [444a-445a, 997a].

Nonetheless, due to the language of the 1960 Amendment to the NMU constitution, this broadening of the Pension Plan was held improper to the extent that it included persons who were not "officers" of the Union in accordance with the terms of the NMU constitution [District Court Opinion of May 23, 1969; SA 28]. It is clear, however, that this broadening of the Plan was not illegal *per se*, but rather *ultra vires* under the terms of the NMU constitution. In light of this fact, there is no basis for restricting the membership of the Plan beyond that which was mandated by the language of that constitution.

In any event, Mr. Segal submits that the narrow question of the proper interpretation of the NMU constitution is one involving only particular facts and is not worthy of review by this Court.

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* This Amendment also was signed by the NMU and by each of the trustees, including Mr. Freedman who replaced Mr. Cooper as a trustee in 1963 [967a].

B. The Question of Surcharge

Plaintiffs contend that the court below erred in failing to surcharge Mr. Segal for allowing the statute of limitations to run with respect to the payment made to Irving Brauch in April 1966 [859a]. No issue is raised in the cross-petition regarding surcharge of Mr. Segal for the payment made to Perry. Yet whatever meager proof plaintiffs proffered in the District Court on the issue of surcharging Mr. Segal was limited exclusively to the payment made to Perry. Indeed, it was not until July 12, 1972, when the hearings resumed after the District Court had granted defendants' motions to dismiss with respect to all payments except that made to Perry [660a-662a], that the plaintiffs raised their present theory that the Trustees should be surcharged for allowing the statute of limitations to run with respect to Mr. Brauch. And, even after raising this issue at such a late date in this lengthy litigation, plaintiffs offered no evidence to indicate that Mr. Segal was in any respect guilty of bad faith or willful misconduct in not suing Mr. Brauch more than five years and nine months subsequent to the pension payment to him.*

REASONS FOR DENYING THE WRIT

Contrary to plaintiffs' assertions, this case does not present any broad issues of federal labor policy. At least insofar as the issues as to which Mr. Segal is a respondent are concerned, the unanimous decision of the court below affirmed two separate decisions of the District Court which involved only narrow factual questions of interpreting documents and evaluating evidence and, with respect to the

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*As noted above, Mr. Brauch received his pension in April 1966. This payment was not ruled improper until the District Court's decision of January 11, 1972 [SA 84].

surcharge issue, a total lack of evidence. There is no showing in the cross-petition of any "obvious and exceptional error" in these findings of fact.

As to the alleged intracircuit conflict, even if it existed, it would not present grounds for granting the writ. The appropriate procedure to correct such a conflict, when one exists, is to petition for rehearing with a suggestion that the case be reheard *en banc*. *Fed. R. App. P.* 35, 40. Plaintiffs filed such a petition and no circuit judge voted to rehear the case [SA 45]. We submit that the Court of Appeals was correct in refusing to rehear the case since there is, in fact, no intracircuit conflict.

POINT I

The amount to be returned by the pension plan to the NMU is not a question which merits review

A. The Decision Below Affirming the District Court Is Based On Narrow Findings of Fact, Concurred In By Two Courts, Which Do Not Merit Review

This question merely involves the particular facts of this case. They were the subject of concurrent findings by the two courts below. There is no showing of "obvious and exceptional error" which should cause this Court to review such concurrent findings. *See Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1966); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1948).

Under the NMU constitution in effect in 1952, the Trustees and the National Council of the NMU could have admitted to the Plan not only NMU officers, but any and all employees of the Union [SA 3]. In 1960, the NMU constitution was amended to state, in Article 14, Section 7, that:

> "All officers shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustee of the Plan may establish." (Emphasis added.) [SA 27].

Both the District Court and the Court of Appeals felt that, in light of the prior history of the NMU constitution, this amendment prohibited participation in the Plan from 1960 on by any person not an "officer" of the NMU in accordance with the union's constitution. Thus, when the matter was remanded after the first appeal, the District Court was faced with the task of determining what amounts had been contributed by the NMU to the Plan on behalf of "non-officers." As set forth in the District Court's January 11, 1972 opinion, the parties stipulated that the total amount of contributions for "non-elected employees", a term which included all "non-officers", was $1,628,921 [SA 85]. The District Court then found that for a period of approximately six years, from 1963 through 1969, the NMU constitution permitted certain officers to be appointed rather than elected. In addition, during the entire period involved in this litigation, the constitution provided that where a vacancy occurred in certain elective offices, the unexpired term would be filled by appointment. These factual determinations are not challenged here. The District Court then determined that $520,283.38 had been contributed on behalf of persons who were not serving as officers in accordance with the terms of the NMU constitution and ordered the Trustees to return that amount, with interest, to the NMU [SA 89].* These findings were unanimously affirmed in all respects by the Court of Appeals [A 35]. They were clearly correct.

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* Including interest, the amount returned by the Trustees to the NMU treasury was $674,220.60 [A 3].

B. Any Alleged Intracircuit Conflicts, Even If They Existed, Would Not Warrant Review

1. There Is No Intracircuit Conflict

Plaintiffs' contention that the decision of the court below is in conflict with its earlier decision in *Wirtz* v. *National Maritime Union of America*, 399 F.2d 544 (2d Cir. 1968), is without merit. *Wirtz* analyzes various provisions of the LMRDA with respect to the requirement that certain officers of a union be elected. However, the decision from which review is sought here has nothing to do with whether a person is required to be elected under the LMRDA, but deals only with whether certain people were entitled to participate in the Pension Plan in accordance with the terms of that Plan and of the NMU constitution. It is clear that, had the NMU constitution so provided, all employees of the NMU—officers and non-officers alike—could have participated in the Pension Plan and, indeed, the participation of those included in the Pension Plan was at all times approved by the membership of the NMU [251a-252a].*

Plaintiffs also contend, erroneously, that the most recent decision of the Court of Appeals is inconsistent with that court's 1970 decision with respect to who may participate in the Pension Plan. As stated by Judge Hays in his opinion of June 18, 1973:

> "The plaintiffs contend that on the prior appeal this court interpreted the NMU constitution to deny coverage to non-elected officers. That issue was not before us on the previous appeal and we did not decide it one way or the other. There is nothing in

* Plaintiffs' assertions about Judge Hays' attempt to override *Wirtz* (Cross-Petition, pages 9-11) are completely answered by the fact that Judge Timbers, the author of the *Wirtz* opinion, was on the panel whose decision plaintiffs seek to review here, and he obviously saw no inconsistentcy.

> our prior opinion which prevents our accepting the ruling of the district court which seems to us to be correct." [A 40].

Two other facts make clear that no such conflict exists. First, as noted above, the entire basis for the earlier opinion was that the 1960 amendment to the NMU constitution prohibited participation by "non-officers". That amendment had nothing whatever to say about "non-elected" personnel.

Second, the specific language of the District Court judgment granting plaintiffs' motion for summary judgment on this issue states:

> "Plaintiffs' motion for summary judgment is granted and judgment will be entered in favor of plaintiffs . . . directing the Trustees to return to the NMU *all moneys received by the Trustees for the benefit of non-officers*, with interest from the dates the moneys were received." (Emphasis added.) (Judgment dated July 11, 1969, pp. 2-3.)

It was this judgment—referring only to "non-officers"—that was affirmed by the earlier Court of Appeals decision.

2. In Any Event, No Ground For Review Is Presented

Moreover, even if this case presented the intracircuit conflicts alleged by plaintiffs, review would not be warranted. While a direct conflict between decisions of different courts of appeals (which is not claimed here) is a basis upon which this Court often grants certiorari, when the claim is only that a second panel in the same circuit has improperly disregarded the decision of an earlier panel the appropriate remedy is review at the circuit level. *Wisniewski* v. *United States*, 353 U.S. 901 (1957); *United States ex rel Robinson* v. *Johnston*, 316 U.S. 649 (1941).

See Fed. R. App. P. 35, 40. Plaintiffs sought review at the circuit level and their petition for rehearing (with a suggestion that it be reheard *en banc*) was denied without dissent.

The two instances referred to at page 9 of the cross-petition in which writs were granted because of intracircuit conflict: *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950), and *Maggio* v. *Zeitz*, 333 U.S. 56 (1948), were extraordinary situations which have no bearing on this case. As recognized in this Court's opinion in *Maggio*, at that time the Second Circuit had no *en banc* review procedure and the intervention of this Court was occasionally necessary. With a procedure for *en banc* review now in existence in the Second Circuit—one sought by plaintiffs here—the Court should not become involved in the internal administration of the Court of Appeals for the Second Circuit.

POINT II

The question of surcharging Mr. Segal with respect to the Brauch payment does not merit review.

Plaintiffs' contention that Mr. Segal should be surcharged for allowing the statute of limitations to run with regard to the Brauch payment was not seriously pursued in the courts below. Indeed, plaintiffs offered absolutely no evidence of any bad faith or willful misconduct by Mr. Segal in this respect. This total lack of evidence mandated the unanimous decisions below since the operative trust agreements explicitly provided that a Trustee shall not

> "be liable for any actions taken or omitted by him unless such act or omission is the result of willful misconduct . . . ."*

* 1952 Trust Agreement, Section III.C.5 [940a, 941a-942a]; 1961 Trust Agreement, Section III.C.5 [954a-955a, 956a].

As with POINT I above, there is no showing of error to warrant review of the concurrent findings below.

The cases cited by plaintiffs in support of their effort to surcharge Mr. Segal are totally inapposite. In *Village of Brookfield* v. *Tentis*, 101 F.2d 516 (7th Cir. 1939), the court never even considered the *obligation* of the trustee to enforce a possible claim, but only his *right* as a trustee to pursue such a claim. *Grodsky* v. *Sipe*, 30 F. Supp. 656 (E.D. Ill. 1940), involved trustees who had completely neglected their fiduciary duties by general laxity and mismanagement, a claim which has never been made against Mr. Segal throughout this long proceeding.

Moreover, none of the authorities cited by plaintiffs even purport to deal with the effect of an exoneration clause such as that quoted above. Indeed, both the *Tentis* and *Grodsky* decisions relied on Pomeroy, *Equity Jurisprudence* (5th ed. 1941) for their statements of general trustee rights and duties. This work, at page 231, states:

> "Without doubt the trustor in the trust instrument may exonerate the trustee from liability in prescribed circumstances, or the trustee may insist upon such a provision as a condition of his undertaking the trust; and the courts will uphold such provisions and give them effect, at least where the trustee has acted in good faith and there has been no willful misconduct."

The dispositions below were adequate and correct and there is no proper basis for review.

CONCLUSION

The decision of the court below, affirming the findings of the District Court with respect to the matters discussed above, is correct and does not present an issue warranting review by this Court. No question of general federal labor policy is presented. The cross-petition should be denied.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
Counsel for Respondent to the Cross-Petition
MARTIN E. SEGAL
One Battery Park Plaza
New York, New York 10004

Of Counsel

ROY L. REARDON
MELVYN L. CANTOR
RONALD L. GINNS
SIMPSON THACHER & BARTLETT